IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

LACEY M. FILOSA, a single person, Respondent, v. PAINLESS STEEL— EVERETT LLC, a Washington Corporation; and James Lee Burns and Mandy N. Burns, his spouse, as sole owners of Painless Steel – Everett LLC; Taylor Doose, an employee or agent of Painless Steel -- Everett LLC; and John Does (agents or employees of Painless Steel -- Everett LLC), Respondents, SCOTTSDALE INSURANCE COMPANY, Appellant.	)	No. 64614-1-I DIVISION ONE UNPUBLISHED OPINION FILED: April 25, 2011

Grosse, J. — A trial court has discretion in determining the reasonableness of a settlement offer for purposes of RCW 4.22.060. On appeal, the parties may not reargue their theories as to reasonableness. Rather, the trial court's reasonableness determination is reviewed on appeal only for abuse of discretion. Here, the trial court did not abuse its discretion in finding the settlement agreement reasonable. Accordingly, we affirm.

FACTS

James Lee Burns was the sole owner of Painless Steel—Everett, LLC, a tattoo and body piercing business. Burns owned the building in which Painless Steel operated and leased space to Painless Steel. Scottsdale Insurance

Company insured Burns under a commercial general liability policy with a policy limit of $1 million. According to Burns' insurance broker, the policy covered only the liability associated with the building in which Painless Steel operated and did not cover any of the operations run from the building. Painless Steel did not have insurance that covered its operations.

In March 2006, Lacey Filosa had her tongue pierced at Painless Steel. Prior to the procedure, Filosa signed a form consenting to the procedure and agreeing to hold "Painless Steel Tattooing & Body Piercing" and Taylor Doose, the piercer, "harmless from all damages, actions, cause of action, claim judgments, costs of litigation, attorney fees, and all other costs and expenses which might arise" from the decision to have her tongue pierced. The form also contained the following:

> Tattoos/piercings are of a permanent nature and may possibly change over time as your body takes on drastic changes. Scarring and/or fading are also possible due to lack of proper tattoo/piercing maintenance. Also, allergies or contact sensitivity to pigments, soaps, or other substances used during the tattooing/piercing procedure. SO TAKE CARE OF YOUR TATTOO/PIERCING!!

Burns drafted the form, including this language.

Filosa also received after care instructions from Painless Steel. These instructions did not specifically warn of the risk of infection from a tongue piercing. Rather, the instructions mention infection only in the context of a general warning about all body piercings stating, "If signs of infection (prolonged soreness or pain, extensive redness and/or discolored secretion) occur, CONTACT YOUR PIERCER OR A PHYSICIAN to discuss your best options,"

and a warning specific to oral piercings stating, "Quitting smoking and chewing during the healing process will greatly reduce your chance of infection."

Doose, the piercer, inserted a metal barbell, or labret, into Filosa's tongue. Filosa alleges that Doose was not wearing gloves at the time, but Doose claims that he always, without exception, wears gloves when performing tongue piercings. A few days later, when the swelling in her tongue went down, Filosa returned to Painless Steel and Doose removed the labret and inserted a smaller one. Filosa claims that Doose did not wear gloves during this procedure.

A few days after the procedure, Filosa went to the dentist complaining of pain in her back molars. The dentist thought she might have an abscess and prescribed antibiotics. Filosa's condition continued to worsen, and she returned to the dentist four days later. The dentist tried to take x-rays of her mouth, but she was unable to open her mouth wide enough. The dentist then referred Filosa to a second dentist, who was able to take x-rays of Filosa's mouth and who told her to go to the hospital.

Filosa was admitted to Providence Everett Medical Center. While being examined, Filosa went into respiratory arrest, and Dr. James Erhardt performed tracheotomy surgery on her. Dr. Erhardt diagnosed a bacterial infection and described it as the most aggressive and rapidly progressing bacterial infection he had ever seen. Surgeons performed exploratory surgery on Filosa's neck, and she continued to accumulate infectious pockets in her neck. Filosa was

transferred to Virginia Mason Hospital for hyperbaric oxygen therapy. Filosa's medical expenses from this incident exceed $486,000.

Filosa filed a negligence action against Painless Steel, James Lee Burns, his wife Mandy Burns, and Taylor Doose, the piercer. Scottsdale refused to defend Burns or provide coverage under its policy on the ground that the policy did not cover the claim.

In March 2008, Filosa, Painless Steel, and James Lee and Mandy Burns entered a settlement agreement and assignment of rights, judgment, and covenant. In the agreement, the defendants agreed to have judgment entered against them for $3 million, subject to the court's determination of reasonableness, and assigned to Filosa their rights against Scottsdale. Filosa agreed not to execute the judgment against the defendants and agreed instead to seek satisfaction of the judgment solely against Scottsdale.

The trial court held a reasonableness hearing in April 2008 and determined that the $3 million settlement was reasonable. In June 2008, James Lee and Mandy Burns, Painless Steel, and Filosa filed an action against Scottsdale under the Insurance Fair Conduct Act, RCW 48.30.015, alleging that the $3 million judgment was the presumptive measure of bad faith damages. Scottsdale moved for relief from the reasonableness order under CR 60(b)(3), alleging newly discovered evidence as to causation. The trial court granted the motion based on misrepresentations about Dr. Erhardt's opinion as to the cause of Filosa's infection. The court stated that it was initially led to believe that Dr.

Erhardt was of the opinion that the labret was the source of the bacteria, but that the newly discovered evidence showed that Dr. Erhardt really believed that the bacteria came from Filosa's saliva. The trial court vacated the order and ordered a new reasonableness hearing.

The second reasonableness hearing was held in September 2009. By order filed October 8, 2009, the trial court again determined that the $3 million settlement was reasonable. Scottsdale appeals.

ANALYSIS

In order for a settlement agreement to be valid and enforceable, the trial court must make a determination that the amount to be paid is reasonable.[1] In making a reasonableness determination, the trial court considers the factors set out in Chaussee v. Maryland Casualty Co.,[2] which are derived from Glover v. Tacoma General Hospital.[3] These factors are

> [t]he releasing person's damages; the merits of the releasing person's liability theory; the merits of the released person's defense theory; the released person's relative faults; the risks and expenses of continued litigation; the released person's ability to pay; any evidence of bad faith, collusion, or fraud; the extent of the releasing person's investigation and preparation of the case; and the interests of the parties not being released.[4]

All of these factors may not be relevant in any given case.[5] Nor does any one factor control.[6] The trial court has discretion to weigh each case

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[1] RCW 4.22.060(1).
[2] 60 Wn. App. 504, 803 P.2d 1339 (1991).
[3] 98 Wn.2d 708, 658 P.2d 1230 (1983), overruled on other grounds by Crown Controls, Inc. v. Smiley, 110 Wn.2d 695, 756 P.2d 717 (1988).
[4] Chaussee, 60 Wn. App. at 512 (quoting Glover, 98 Wn.2d at 717).
[5] Green v. City of Wenatchee, 148 Wn. App. 351, 364, 199 P.3d 1029 (2009).
[6] Chaussee, 60 Wn. App. at 512.

individually,[7] and we review the trial court's determination of reasonableness only for abuse of discretion.[8] We will not disturb the factual findings the trial court makes in determining reasonableness if they are supported by substantial evidence.[9] Where, as here, the trial court does not enter written findings of fact and conclusions of law, we may look to the trial court's oral opinion to clarify the basis for the trial court's ruling.[10] Here, the trial court discussed all nine of the factors.

Releasing Person's Damages

Scottsdale concedes the dollar amount of Filosa's medical expenses. It fails, however, to discuss the nature and extent of the injuries Filosa suffered. Dr. Erhardt testified that the pus coming out of the incisions he made in Filosa's neck "was everywhere" and that her infection was "the most life-threatening infection [he had] ever treated."[11] The initial procedures performed on Filosa after she arrived at the emergency room were a tracheotomy, numerous incisions in her neck, oral surgery to open the inside of her mouth, and the insertion of 16 drains in her chest and neck. Dr. Erhardt testified that "within any 12-hour period she could have gone off the edge," meaning that Filosa came close to dying a number of times during her treatment. In Dr. Erhardt's opinion,

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[7] Glover, 98 Wn.2d at 717-18.
[8] Water's Edge Homeowners Ass'n v. Water's Edge Assocs., 152 Wn. App. 572, 584-585, 216 P.3d 1110 (2009).
[9] Howard v. Royal Specialty Underwriting, Inc., 121 Wn. App. 372, 380, 89 P.3d 265 (2004).
[10] Goodman v. Darden, Doman & Stafford Assocs., 100 Wn.2d 476, 481, 670 P.2d 648 (1983).
[11] Dr. Erhardt testified, "Every area that I opened had pus coming out."

Filosa's treatment in Virginia Mason Hospital's hyperbaric chamber was the reason she survived.

Filosa testified that she has no memory of her time in the hyperbaric chamber and that she was in a coma during that time. She also testified about her rehabilitation, which included a special diet to regain the weight she lost, muscle-strengthening movements, and voice exercises. Filosa has permanent scarring on her neck, and she testified that people stare at her scars, which makes her feel "lower than them."

The trial court heard and read testimony of three attorneys as to a reasonable settlement amount given Filosa's damages. Two of the attorneys testified that $3 million was a reasonable settlement amount. A third attorney testified on behalf of Scottsdale that the value of Filosa's claim was between $500,000 and $750,000, taking into consideration the defenses that could be asserted, and between $1.5 million and $2 million without a reduction for the defenses. Given that there was substantial evidence to support the $3 million figure, the trial court's determination that that evidence was more credible than Scottsdale's evidence was not an abuse of discretion.

Merits of Releasing Person's Liability Theory

During the first reasonableness hearing, Filosa's theory was that bacteria on the labret caused the infection. When it came to light that this was a misstatement of Dr. Erhardt's opinion as to causation, the trial court vacated its original order finding the settlement reasonable and ordered a second

reasonableness hearing. At the second hearing, Dr. Erhardt testified that the bacteria were "consistent" with those in saliva, but he could not conclusively determine whether the bacteria came from Filosa's saliva or from bacteria from someone else's mouth that had been on Doose's ungloved hand when he performed the piercing. Regardless of the source of the bacteria (the labret, Filosa's saliva, or Doose's hand), there is no dispute that the bacteria entered Filosa's system through the hole in her tongue put there by the piercing. The court's finding that the tongue piercing procedure was the proximate cause of the entry of the bacteria into Filosa's system is supported by the evidence.

The trial court also did not abuse its discretion in finding that Filosa's theory of liability based on failure to warn had merit. Filosa testified that nobody at Painless Steel told her that she could develop a necrotizing infection from a tongue piercing. She also testified that, had somebody told her of the risk of developing a life-threatening infection as a result of tongue piercing, she would not have had the procedure. The written information Filosa was given before the procedure did not warn of the risk of infection from a tongue piercing. Filosa did testify that she had her ears pierced at age 13 and knew at that time that her pierced ears could become infected and close if she did not clean her earrings. She was not, however, aware that ear piercing carried the risk of a "bad infection." Scottsdale argues that Filosa's knowledge at 13 of the risk of the holes in her ears becoming infected is sufficient to impute to her knowledge that a tongue piercing poses the risk of a potentially life-threatening infection. But

Scottsdale's own expert testified that the bacteria that caused Filosa's infection live only in wet, warm, and oxygen-poor environments, such as a person's mouth, and that unlike infections from tongue piercings, infections on pierced ears simply get red for a few days and then go away.[12] The evidence shows that infections in pierced ears are far less serious than infections from a pierced tongue. Contrary to Scottsdale's argument, it is not undisputed that Filosa knew of the risk of infection from a tongue piercing, even if she knew that holes from ear piercings can become infected if the earrings are not cleaned.[13]

Scottsdale argues that the merits of Filosa's theory involving Doose's failure to wear gloves during the procedure should not be considered because evidence that Filosa's friend, Jessica Ladd, would testify that Doose was not wearing gloves was not known to the parties at the time of settlement.[14] Ladd's declaration was not introduced into evidence until the second reasonableness hearing. But, even if Filosa did not disclose Ladd at the time of settlement, Filosa herself observed Doose and was of the opinion that he did not wear gloves. Moreover, in her amended complaint, Filosa raises the defendants' failure to maintain the premises free of harmful germs and bacteria as an allegation of negligence.

Merits of the Released Person's Defense Theory

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[12] The expert also testified to "the unique microbiology of the mouth."

[13] We disagree with Scottsdale's argument that the failure to warn theory had not been raised at the time of the settlement negotiations. The theory was raised in Filosa's amended complaint.

[14] See Mavroudis v. Pittsburgh-Corning Corp., 86 Wn. App. 22, 26, 935 P.2d 684 (1997) (the reasonableness of a settlement is determined in light of the information available at the time the settlement was made).

One defense theory Scottsdale raises is based on the form Filosa signed prior to getting the tongue piercing that warned about scarring, fading, allergies, and contact sensitivity and that contained a hold harmless provision. Scottsdale argues that the hold harmless provision creates a complete defense to liability. Two attorneys testified at the second reasonableness hearing that the hold harmless agreement was not a defense to liability. One attorney testified that the document does not contain "release language," does not cover James Lee and Mandy Burns or Painless Steel—Everett, LLC, does not give notice of the particular risk involved in this case, and, in short, had no legal effect as a release. The other attorney likewise testified that the provision is not a defense to liability because it does not release the defendants involved here and does not warn of the risk. The trial court agreed:

> The defense theory that this release or this waiver of hold harmless [sic] is effective, quite frankly, I don't think is very strong. In terms of how it's worded, it doesn't refer to this type of risk. In terms of who is released, I don't think it releases these named defendants.

We agree that the hold harmless provision is not a defense to liability. "Exculpatory clauses in preinjury releases are strictly construed and must be clear if the exemption from liability is to be enforced."[15] While the language of the hold harmless provision may be broad enough to cover a claim regarding an infection resulting from a tongue piercing, the provision, strictly construed, does not release either the Burnses or Painless Steel—Everett, LLC. Rather, it releases only "Painless Steel Tattooing & Body Piercing and the below signed

[15] Vodopest v. MacGregor, 128 Wn.2d 840, 848, 913 P.2d 779 (1996).

tattoo artist/piercer." The trial court rightly found that this defense theory is not strong under a strict construction of the hold harmless agreement.

Scottsdale argues that even if the hold harmless agreement is not a defense to liability, James Lee Burns cannot be held personally liable even though it is undisputed that he drafted the form containing the warnings and the hold harmless provision.[16] However, by statute, a member of a limited liability company is personally liable for his or her own torts.[17] Accordingly, the defense theory that James Lee Burns cannot be held liable if he was negligent in drafting the warnings is, at best, weak.

Scottsdale also argues that Filosa is judicially estopped from seeking to hold James Lee Burns personally liable. Its argument is based on the statement in Filosa's motion to amend her complaint that she was seeking leave to add James Lee and Mandy Burns as defendants in their capacity as owners of Painless Steel, not as individuals subject to personal liability. We reject Scottsdale's argument.

When Filosa moved to amend her complaint and stated that she did not seek to hold the Burnses personally liable, her counsel was unaware that Burns personally drafted the form containing the allegedly inadequate warnings. Discovery had not progressed far enough for that information to be produced.[18]

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[16] Scottsdale frames its argument as Burns' liability for drafting the *hold harmless provisions*. The correct issue is Burns' liability for drafting the *warnings*. Both are contained in the same document.

[17] RCW 25.15.125(2).

[18] The motion to amend the complaint was filed in 2007; Burns' declaration in which he states that he drafted the form is dated 2009.

Nor had discovery progressed far enough at the time of the settlement negotiations. Burns, on the other hand, was well aware at the time of settlement that he drafted the warnings that were the basis of Filosa's failure to warn claim.

The doctrine of judicial estoppel prevents a party from asserting a particular position in a judicial proceeding and later taking an inconsistent position in order to gain an advantage.[19] "The gravamen of judicial estoppel is the intentional assertion of an inconsistent position that erodes respect for the judicial process and the courts."[20] Here, if Filosa was unaware at the time she asserted that she was not seeking to hold James Lee Burns personally liable that Burns drafted the warnings she claims were inadequate, then she could not possibly have intentionally asserted inconsistent positions. Without the intentional assertion of an inconsistent position, judicial estoppel does not apply.

As another potential defense theory, Scottsdale argues that Filosa's claim is barred by the doctrine of implied primary assumption of the risk. Scottsdale makes this argument in a footnote. We decline to address the merits of an argument contained in a footnote because placing an argument in a footnote is ambiguous or equivocal as to whether the issue is intended to be part of the appeal.[21]

Finally, Scottsdale relies on Werlinger v. Warner,[22] where the appellate

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[19] Arkison v. Ethan Allen, Inc., 160 Wn.2d 535, 538, 160 P.3d 13 (2007).
[20] Ashmore v. Estate of Duff, 165 Wn.2d 948, 950, 205 P.3d 111 (2009) (emphasis added).
[21] St. Joseph General Hosp. v. Dep't of Revenue, 158 Wn. App. 450, 472-73, 242 P.3d 897 (2010).
[22] 126 Wn. App. 342, 109 P.3d 22 (2005).

court affirmed the trial court's determination that a settlement was not reasonable. That case is, however, distinguishable in that the personal liability of the defendant had been discharged in bankruptcy and the insurer did not fail to defend the defendant. The court in Werlinger placed significance on the fact that the defendant had a complete defense to liability because of the bankruptcy and "not a penny could ever be collected" from the defendant personally.[23] This fact, the court determined, outweighed the strength of the plaintiff's case against the defendant. Here, however, there is no discharge in bankruptcy, and the defendants did not have a complete defense to liability based on a discharge. Further, unlike in Werlinger, Scottsdale did refuse to defend its insured. The court in Werlinger stated that where an insurer breaches its duty to defend, a covenant judgment can be reasonable per se.[24]

Released Person's Relative Fault

Scottsdale argues that we should remand for the apportionment of liability among James Lee Burns, Mandy Burns, Painless Steel, and Filosa. It did not, however, raise as an assignment of error the trial court's failure to apportion liability. In any event, the Glover/Chaussee factors do not require that the trial court apportion liability in making a reasonableness determination. Rather, the trial court is simply required to consider the relative fault of the releasing party. The trial court did this and found "very little relative fault on the part of the plaintiff." The court reasoned:

It may be argued that an 18, 19 year old should know any time you have

[23] 126 Wn. App. at 351.
[24] 126 Wn. App. at 350.

> tattooing and/or body piercing you could have an infection, but I don't think that the average juror would buy that in the sense that the type of infection, the danger of this particular infection. It may be that they would say, well, you're going to get some sort of infection, but I don't think they realize how life-threatening this bacteria can be. That's probably why it made the front page of the paper. So in terms of relative fault, I don't see very much on the part of the plaintiff.

The papers Filosa was given at Painless Steel before the procedure did not warn of the risk of the severe infection. She testified that she had no knowledge of the risk. The evidence does not support the argument that Filosa had sufficient knowledge of the risks of the procedure when she decided to undergo it, such that she can be held at fault for her injuries.

Moreover, this factor is relevant where "the trial court is determining the reasonableness of a settlement between one or more codefendants with a plaintiff, the effect of which is to cast liability on the nonsettling codefendant, rather than the relative fault between defendants and plaintiffs."[25] Here, there were no nonsettling defendants. Application of this factor does not weigh against the reasonableness of the settlement agreement.

Evidence of the Settling Parties' Bad Faith, Collusion, or Fraud

Scottsdale claims there was pervasive bad faith, collusion, and fraud throughout the litigation. One fact on which it relies is the fact that the trial court found fraud and misrepresentation regarding Dr. Erhardt's opinion as to causation. As a result of this, the trial court vacated the first reasonableness order and held a second reasonableness hearing. As the trial court stated in its

[25] Water's Edge Homeowners Ass'n v. Water's Edge Assocs., 152 Wn. App. 572, 591, 216 P.3d 1110 (2009).

oral opinion, however, this fraud and misrepresentation—on Filosa's part and directed at the court—has nothing to do with the Glover/Chaussee factor, which looks to bad faith, collusion, or fraud among the settling parties with regard to the settlement agreement.

Scottsdale also argues that the collusion the court found in Water's Edge Homeowners Ass'n v. Water's Edge Assocs.[26] is also present here. Water's Edge is distinguishable. Circumstances in that case on which the trial court based its finding of collusion included one party's counsel ghost writing a letter for adverse parties, an abrupt shift from litigation to collaboration, a kick back scheme where the plaintiff agreed to kick back some of the proceeds from any recovery from the insurer to the insureds, and coverage counsel's insistence that the settlement be binding regardless of whether the trial court found it reasonable. There is evidence of none of these factors in this case.

Scottsdale points to the fact that the Burnses' counsel, Dylan Jackson, estimated at the time he was retained that the potential damages could be $1 million. Jackson testified at the reasonableness hearing, however, that at the time of his evaluation he did not have evidence of all of Filosa's medical bills, initially thought the problem was a dental abscess, and had only very poor photographs of Filosa's scarring, which did not show what he called the worst scarring he had ever seen in 12 or 13 years of practicing law. He testified that there was no fraud, collusion, or bad faith among the parties in entering the settlement agreement, and felt that the $3 million figure was the best possible

[26] 152 Wn. App. 572, 216 P.3d 1110 (2009).

result for his clients. He also testified that he believed that Filosa had sufficient evidence to prove one or more of her theories of liability. The trial court's finding of no bad faith, collusion, or fraud among the settling parties is supported by the evidence.

Interests of the Parties Not Being Released

Scottsdale argues that the settlement agreement is unreasonable given its significant interest in this action. Without doubt, Scottsdale has a significant interest in a finding that the settlement is unreasonably high, particularly given that Filosa seeks treble damages under the Insurance Fair Conduct Act. However, the defendants attempted on a number of occasions to bring Scottsdale into the litigation, but Scottsdale refused each time. Further, Scottsdale fully participated in the second reasonableness hearing. Scottsdale's dissatisfaction with the settlement amount does not render the amount unreasonable.

Other Factors

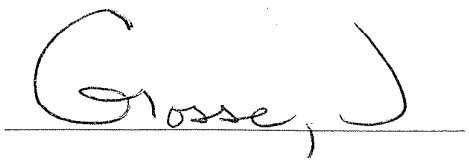
Several of the Chaussee/Glover factors are of lesser relevance to the reasonableness determination in this case. One such factor is the risks and expenses of continued litigation. All of the parties would have incurred considerable expenses had the litigation continued. As to risks, Scottsdale argues Filosa bore a significant risk of summary dismissal; Filosa argues the defendants bore a significant risk of incurring great personal liability. If anything, this factor weighed equally as to the parties.

Similarly the extent of the releasing person's investigation and preparation of the case is a factor of lesser relevance. None of the parties had taken depositions at the time of settlement. Filosa had propounded interrogatories, answered interrogatories, interviewed Dr. Erhardt, and, according to her brief, reviewed the medical records. Filosa's investigation and preparation of the case was at least as extensive, if not more extensive, than that done by the other parties.

Finally, we find no abuse of discretion in the trial court's determination that, although Painless Steel's net worth of $75,000 and the Burnses' personal assets total of $800,000 motivated James Lee Burns to settle, this motivation does not necessarily mean that the defendants would have accepted any settlement figure "that was thrown out on the table." Scottsdale rightly admits that this factor is entitled to less weight than the other factors.

CONCLUSION

The trial court did not abuse its discretion in determining the settlement agreement the parties entered into in this case was reasonable. The trial court's order finding the settlement agreement reasonable is affirmed.



WE CONCUR:

Schindler, J. Cox, J.